

## OPINION NO. 69-149

**Syllabus:**

One who is appointed to serve until the next general election following the resignation of a judge of a municipal court, and one who is elected at such election to serve for the remainder of the unexpired term, are entitled to a salary increase authorized by Section 1901.11, Revised Code, when such increase is authorized during the existing term of a judge who has resigned, but prior to the appointment or election of his successor to serve for the remainder of the unexpired term.

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To: Frederick E. Markley, Hardin County Pros. Atty., Kenton, Ohio  
By: Paul W. Brown, Attorney General, November 17, 1969

Your letter of request for my opinion reads in part as follows:

"\* \* \*The Kenton Municipal Court judge resigned effective September 2 and there was an appointment made to serve until November 4th election and the qualifying of his successor which will be for the balance of the two years.

"During the term of the previous Judge, under Section 1901.11, Revised Code of Ohio, there was an increase made in the salary of the Municipal Judge and the same was effective on June 10, 1968.

"The question here is really two-fold: Does the Judge appointed for the two month term and also the Judge that is elected in November for the balance of the two year term, become eligible to receive the increase in salary?

"\* \* \* \* \* \* \* \*"

The specific question of whether one who is appointed or elected to the remainder of an unexpired term of a judge of a municipal court is entitled to an increase in salary, when such increase is authorized during the existing term of a judge who has resigned, but prior to the appointment or election to the remainder of the unexpired term, has not been previously considered by the courts of this state or by this office. However, the general question has been considered in connection with officers other than municipal judges.

In Opinion No. 1101, Opinions of the Attorney General for 1949, the then Attorney General was asked whether one appointed to fill the unexpired term of a deceased county commissioner would be eligible to receive an increase in salary authorized during the deceased commissioner's term, but prior to the appointment of his successor. In that instance it was concluded that such an increase was not authorized, but only because the statute granting the increase was interpreted to apply to the term of office rather than the incumbent of the office. At page 748 of Opinion No. 1101, supra, it is stated:

"The judicial decisions of Ohio indicate unquestionably that the salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor was elected for the term he is to complete.

"See: State ex rel. Pugh v. Tanner, 27 O.C.A. p. 385; State ex rel. Glander v. Ferguson, 148 O.S. p. 581; Opinions of the Attorney General for 1943, p. 35."  
(Emphasis added.)

Opinion No. 5791, Opinions of the Attorney General for 1943 (cited above as "Opinions of the Attorney General for 1943, p. 35") also concerns an appointee to fill the unexpired term of a county commissioner, and concludes that, under the circumstances disclosed by that request, the appointee is entitled to receive the increased salary. We find the following, beginning at page 38 of that opinion:

"The question as to the right of one who is appointed to fill the vacancy in an office for the remainder of the term \* \* \* to have the benefit of the increased salary is one upon which the courts and authorities generally have not been wholly in agreement.

"In 43 Am. Jur., 'Public Officers', Section 351, it is said:

"The courts have experienced some difficulty in applying the foregoing constitutional prohibitions against changing salaries of public officers to persons elected or appointed to fill out the balance of an unexpired term. Some courts have held that the successor so chosen to fill out the term after the death, resignation, or removal of his predecessor stands for all purposes in the latter's shoes, and cannot claim the increased compensation provided for during that officer's incumbency. Other cases have taken a different view and have allowed the increased salary to the person filling the balance of the term. The lack of uniformity upon this point is perhaps due to difference in the wording of the constitutional restriction."

"In 46 Corpus Jur. p. 1023, the same uncertainty and divergence of opinion are also noted and cases are cited on both sides of the proposition. However, the Ohio courts seem to have settled the question rather definitely in favor of the right of an appointee to fill a vacancy under such circumstances to have the benefit of the increase in salary which was made after the beginning of the original term to which he succeeds but before his appointment to fill the vacancy.

"In the case of State ex rel. v. Tanner, 27 O. C.A., 385, it was held:

"The salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor was elected for the term he is to complete."

"This case related to a municipal officer and arose directly under the provisions of Section 4123, General Code, which provided:

"The salary of any officer, clerk or employee shall not be increased or diminished during the term for which he was elected or appointed."

"The court said at page 386 of the opinion:

"In the investigation made we have failed to find that the question here made has been passed upon by the courts of this state, although it appears to have been the subject of judicial action by the courts in some other states, not, however, with unvarying unanimity of view and decision, to which we will refer later on.

"\* \* \*All the authorities seem to agree that the constitutional and statutory inhibition against a change in the compensation of an officer during his incumbency of an office is founded upon considerations of public policy in guarding and protecting the public against a possible combination of office-holding interests and log-rolling Legislatures in an effort to raise their salaries. With the limitation of power laid upon the law-making body as if to prevent such influences and abuses, it would seem that the Legislature in framing this law had in mind the incumbent of the office rather than the office itself.' (Emphasis mine.)

"\* \* \*

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The conclusion of Opinion No. 5791, supra, is in accord with Ohio cases generally. It is clear that Ohio has taken the position that one who fills a vacancy is entitled to an increase in salary authorized after the beginning of the original term to which he succeeds but before his appointment to fill the vacancy, because the restriction on an increase in salary during term is personal to the incumbent of the office, and does not apply to his successor, except when the statute granting the increase specifically applies to a term of office as distinguished from the incumbent of the office. The same must also be true in regard to one who is elected to fill an unexpired term under these circumstances.

No restriction of the kind heretofore noted appears in Section 1901.11, supra. It is, therefore, my opinion, and you are hereby advised, that one who is appointed to serve until the next general election following the resignation of a judge of a municipal court, and one who is elected at such election to serve for the remainder of the unexpired term, are entitled to a salary increase authorized by Section 1901.11, Revised Code, when such increase is authorized during the existing term of a judge who has resigned, but prior to the appointment or election of his successor to serve for the remainder of the unexpired term.